92-1188

NO. ____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

IN RE THE MARRIAGE OF:

CLAUDE A. STRASS, PETITIONER

AND

BETH G. STRASS, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

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QUESTION PRESENTED FOR REVIEW

The question presented for review is whether there is a constitutional right to counsel in a civil case in a state trial court. The constitutional right of due process of law requires a fair hearing with appropriate assistance of counsel and a fair opportunity to obtain counsel. The Constitution of the United States of America, Amend. V and Amend. XIV, Sect. 1; Chandler v. Fretag, 348 U.S. 3, 99 L. Ed. 4, 9-10 (1954). Although the right to counsel in criminal matters has been well publicized in the second half of this century, Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 802-806 (1963), the question of the right to counsel in civil matters where all of a party's family life and financial assets may be at issue is also important and is necessary to resolve to assure fundamental fairness in our increasingly litigious society.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

IN RE THE MARRIAGE OF:

CLAUDE A. STRASS, PETITIONER

AND

BETH G. STRASS, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

The petitioner Claude A. Strass respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of Illinois, Second District, entered in the above entitled proceeding on May 22, 1992.

OPINIONS BELOW

The Supreme Court of Illinois denied Claude A. Strass's petition for leave to appeal on October 7, 1992.

That denial is not reported in an official published reporter. The opinion of the Appellate Court of Illinois which was the subject of the petition for leave to appeal to the Supreme Court of Illinois was filed on May 22, 1992. That opinion of the Appellate Court of Illinois is not reported in an official published reporter, but bears a docket number of No. 2-91-1094 (Ill. App. Ct., 2nd Dist., May 22, 1992). The denial of the petition for leave to appeal by the Supreme Court of Illinois and the opinion of the Appellate Court of Illinois are reprinted in the appendix to this petition.

JURISDICTION

The denial of the petition for leave to appeal by the Supreme Court of Illinois was entered on October 7, 1992. No petition for rehearing was filed. The opinion and judgment of the Appellate Court of Illinois was entered on May 22, 1992. No petition for

rehearing was filed. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitution of the United States of America, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Constitution of the United States of America, Amendment XIV, Section 1:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Illinois Supreme Court Rules, Rule 231 (f), 134 Ill. 2d R.231(f):

(f) Time for Motion. No motion for the continuance of a cause made after the cause has been reached for trial shall be heard, unless a sufficient excuse is shown for the delay.

Illinois Marriage and Dissolution of Marriage Act, ¶602(c), Ill. Rev. Stats., Ch. 40, §602(c) (1989):

(c) The court shall presume that the maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional well-being of their child is in the best interest of the child. However, such presumption shall not be construed as a presumption that an order awarding joint custody is in the best interest of the child.

STATEMENT OF THE CASE

This is an Illinois dissolution of marriage case between Claude A. Strass and Beth G. Strass. Final orders of judgment were entered by the Circuit Court of DuPage County, Illinois on August 27, 1991 (C-328); September 18, 1991 (C-382); and September 24, 1991 (C-412), denying a petition and a motion for reconsideration on the issues of

custody of the parties' minor child, child visitation, property division, and attorney's fees. The trial portion of these proceedings took place over a 9 month long period of time, with actual hearings occurring at intermittent dates and with various continuances between those dates.

Following the child custody portion of the trial court level proceedings, which awarded custody of the parties' minor child to the wife, Beth G. Strass, the husband, Claude A. Strass, fired his attorney. The trial court refused to allow him any time to obtain new counsel and, following the husband's pro se objection of fundamental unfairness, proceeded with additional hearings on property division, child visitation, fees, and costs (C-1631 to C-1636; C-1645 to C-1646). The husband represented himself pro se through the balance of the trial court proceedings. During the course of these additional trial court level

proceedings, the trial court judge allowed what he stated was "minimum" child visitation for the husband even though the trial court judge had previously found the husband to be "capable of being the custodial parent" (C-2130; C-240).

The husband raised the same issue of a constitutional due process of law right to a fair hearing with appropriate assistance of counsel and a fair opportunity to obtain counsel before the Illinois Appellate Court. Revised Brief of Appellant on Appeal to the Illinois Appellate Court, Second Judicial District, pp. 6-7 and 56-57. The Illinois Appellate Court declined to find a due process of law violation in the denial of the husband's request to obtain counsel. In re Marriage of Beth G. Strass and Claude A. Strass, No. 2-91-1094 (Ill. App. Ct., 2nd Dist., May 22, 1992), pp. 14-16. The same issue was also raised in the husband's Petition for Leave to Appeal to the Supreme

Court of Illinois, Petition for Leave to Appeal to the Supreme Court of Illinois, pp. 4-5 and 11-13, and that Petition was also denied by the Illinois Supreme Court.

ARGUMENT

Due process of law requires a fundamentally fair hearing in any legal proceeding that may deprive a party of life, liberty, or property. The Constitution of the United States of America, Amend. V and Amend. XIV, Sect. 1. A fair trial pursuant to due process of law has been found to require appropriate assistance of counsel and a fair opportunity to obtain counsel in, inter alia, criminal cases, Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L. Ed. 2d 799, 802-806 (1963); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972), and juvenile court proceedings, In re Gault, 387 U.S. 1, 18 L. Ed. 2d 527, 536-554 (1967). In Chandler v. Fretag, 348 U.S. 3, 99 L. Ed. 4, 9-10 (1954),

the U.S. Supreme Court stated this rule broadly, without exception, that "...a defendant must be given a reasonable opportunity to employ and consult with counsel...." Chandler v. Fretag, at 99 L. Ed. 10 (1954).

Some courts, however, have restricted the constitutional right to appropriate assistance of counsel and a fair opportunity to obtain counsel to criminal cases. In a criminal case decided 4 months later than the case at bar by the same Illinois Appellate Court that heard the case at bar, for example, the court found that the trial court's refusal to grant a continuance to allow the defendant an opportunity to obtain counsel was reversible error--exactly the opposite of the result in the case at bar. People v. Christopher Sullivan, No. 2-90-0466 (Ill. App. Ct., 2nd Dist., Sept. 10, 1992). The rationale for this distinction would seem to be that the Sixth Amendment to

the United States Constitution specifically mentions the assistance of counsel in a criminal case, but the Fifth and Fourteenth Amendments speak in the more general terms of due process of law for civil cases.

The "concept of liberty" embodied in due process of law, however, "includes unenumerated rights." John Paul Stevens, "The Bill of Rights: A Century of Progress," II. B., p. 16 (The University of Chicago Press, December 1, 1992). The general statement of due process of law in the Fifth and Fourteenth Amendments should, therefore, include the unenumerated right to counsel in a civil case, as here. If assistance of counsel is important in a criminal case where a party's life, liberty, or property may be at stake, it is also important in a civil case where a party's family relations and property are at issue.

As American society has become more litigious in recent years, the need for fair

proceedings that include appropriate assistance of counsel and a fair opportunity to obtain counsel should be expanding, not contracting. As the number of courtroom cases grows, the need to be fair and even handed in the treatment of all parties in all types of cases should also grow. In the case at bar, the trial level hearings occurred over an often interrupted 9 month period. While the husband may have been unwise in terminating counsel after the custody portion of the proceedings, it surely seems unfair to have refused him any reasonable amount of time to obtain new counsel, especially when the proceedings continued for some time thereafter and covered another 500 transcript pages of testimony. While reasonable minds might differ on what constitutes a "reasonable amount of time" to obtain counsel, there should be no question that allowing no time fails to meet this standard. Yet, in the case at bar, the trial

judge allowed the husband no time to obtain new counsel, even though the trial of the matter was not heard on consecutive days in a continuous proceeding (as is common in dissolution of marriage cases in DuPage County, Illinois) and even though numerous continuances were granted for other reasons before and after the denial of an opportunity to obtain counsel (C-1631 to C-1636; C-1645 to C-1646). If this had occurred in a criminal case instead of a civil case, the ruling on this point would have been the opposite. See, for example, People v. Christopher Sullivan, No. 2-90-0466 (Ill. App. Ct., 2nd Dist., Sept. 10, 1992), supra.

If the fundamental fairness of due process of law is to have meaning in everyday life, it should encompass civil as well as criminal proceedings and it should allow any party a few days to obtain counsel in any proceeding, whether tried in 3 straight days or intermittently over 9 months. The right

to counsel in modern American society should be a fundamental constitutional right that is not held subject to judicial discretion, in effect requiring the trial court to become both judge and counsel. If the result is otherwise and the opportunity to obtain counsel is denied, as this case makes clear, a fundamentally fair hearing may easily elude us.

In the case at bar, for example, with the husband appearing pro se, the trial court judge only allowed what he stated was "minimum" child visitation to the husband even though the trial court judge had previously found the husband to be "capable of being the custodial parent" (C-2130; C-240) and even though Illinois statutory law has declared maximum parental involvement to be in the best interest of the child. Illinois Marriage and Dissolution of Marriage Act, ¶602(c), Ill. Rev. Stats., Ch. 40, §602(c) (1989). If the husband could

have had appropriate assistance of counsel at this point in the proceedings, logical consistency on this issue and adherence to Illinois statutory law on child visitation would have been forcefully argued by capable counsel. Instead, the husband here has been provided only minimum contact with his child, even though he was found to be capable of being the custodial parent and Illinois law favors maximum parental paternal involvement in such cases. For want of a lawyer, this issue was lost and, with it, a fundamentally fair hearing appears to have been lost, as well.

Hopefully, due process of law means something more than this. Hopefully, due process of law can provide any party a reasonable opportunity to employ and consult with counsel in any case, and most especially in a case, as here, where a party's personal and financial existence is at issue. The right to counsel and a fair

opportunity to obtain counsel should be deemed a fundamental right in a civil case such as this.

CONCLUSION

For the foregoing reasons, the petitioner, Claude A. Strass, respectfully requests that a writ of certiorari issue to the Appellate Court of Illinois, Second District, so that its judgment and opinion may be reviewed and reversed.

Respectfully submitted,

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APPENDIX

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DENIAL OF PETITION FOR LEAVE TO APPEAL BY ILLINOIS SUPREME COURT 1b

OPINION AND ORDER OF JUDGMENT BY ILLINOIS APPELLATE COURT 1c

FINAL ORDERS OF JUDGMENT OF CIRCUIT COURT OF DUPAGE COUNTY, ILLINOIS:

ORDER OF AUGUST 27, 1991 .....1yy

ORDER OF SEPTEMBER 24, 1991 .....1aaa

ORDER OF SEPTEMBER 18, 1991 .....1ddd

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
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October 7, 1992

Mr. John R. Heying
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Naperville, IL 60540

No. 73792 - Beth G. Strass, respondent, v. Claude A. Strass, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 29, 1992.

No. 2-91-1094

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF	) Appeal from the
	)
	) Circuit Court
	)
	) of Du Page
	)
	) County.
BETH G. STRASS,	)
	)
Petitioner-Appellee,	)
	) No. 89-D-408
	)
and	)
	)
CLAUDE A. STRASS,	) Honorable
	)
	) Robert A. Cox,
	)
Respondent-Appellant.	) Judge,
	)
	) Presiding.

ORDER

In June 1991, the trial court dissolved the six-year marriage of petitioner-appel-

lee, Beth G. Strass, and respondent-appellant, Claude A. Strass. The court granted permanent custody of their only child, Suzzanne, now age five, to Beth. The court also ordered that Claude pay Beth $1,000 in child support per month. Beth waived maintenance payments. The court valued the marital estate at $204,000, and awarded Beth 42% or $86,000. Claude raises five issues on appeal: (1) whether the trial court erred in granting custody of Suzzanne to Beth; (2) whether the trial court erred in allowing certain expert testimony and a taped telephone conversation into evidence; (3) whether Claude's right to due process was violated during the trial, the latter part of which took place after Claude fired his attorney and represented himself pro se; (4) whether the trial court erred in awarding an unequal division of property; and (5) whether the trial court erred in granting the child's attorney's petition

for fees in the amount of $10,737.50. We affirm.

At the outset, we note that Claude's brief is barely adequate and evidences either a blatant disregard for the Supreme Court Rules pertaining to briefs (134 Ill. 2d Rules 344-345) or a weak effort at complying with them. These rules are not mere suggestions (see People v. Wilk (1988), 124 Ill. 2d 93, 103), and should be consulted regularly when an attorney writes an appellate brief. In particular, we find that both Claude's and Beth's briefs were not "securely bound on the left side" as required by Rule 344(b). (134 Ill. 2d R. 344(b).) In fact, Claude's brief was not bound at all, and instead was secured by a rubber band. Claude's statement of facts was replete with conclusory statements and innuendo, in direct violation of Rule 341(e)(6). (134 Ill. 2d R. 341(e)(6).) Claude's argument section contained incomplete sentences,

headings without any argument following, and general statements of law followed by string citations. A discussion of how the facts of the various cases he cited were similar or dissimilar to the instant case would have been helpful. The top one-quarter of page 57 of Claude's brief was missing. We are therefore guided by Beth's statement of facts, and will consider any incoherent or unsubstantiated argument of Claude's to be waived. See Dillard v. Kean (1989), 183 Ill. App. 3d 28, 31.

Beth and Claude were married on April 13, 1985. Prior to the marriage, Beth had resided in the St. Louis area for her entire life. She had two children, who are now 12 and 13 years of age, from her previous marriage to Michael L. Koonce. Beth and Michael were divorced in May 1984. Claude lived in Naperville, Illinois, with his two children from a previous marriage, who are now 16 and 19 years of age. When the parties

married, Beth left her job as a physical therapist at DePaul Hospital in St. Louis and moved with her two children to Naperville to live in Claude's home. They resided in Claude's home for approximately one year, after which they moved into a new home they had built in Naperville. Suzzanne was born in July 1987.

Problems arose in the marriage which were not solved by counseling. In the fall of 1988, the parties discussed a separation where Beth would move to St. Louis for an extended period of time. In January 1989, Beth left Naperville and moved to St. Louis with Suzzanne and her two other children from her previous marriage. Beth filed a petition for dissolution of marriage in the circuit court of Du Page County on February 15, 1989.

Beth lived with her parents for several months and then moved into a three-bedroom condominium in Lake St. Louis, Missouri.

When Beth first moved back to the St. Louis area, she became a self-employed physical therapist doing home visits and earned approximately $30,000 annually. She later became employed by Midwest Orthopedic Physical Therapy, earning approximately $43,000 annually at the time of trial. Claude remained in Naperville and was employed by Molex, earning approximately $93,000 annually.

By March 31, 1989, Beth and Claude had agreed to a temporary visitation schedule of alternate weekends, which involved Claude flying from Chicago to St. Louis to take Suzzanne for weekend visitation on Fridays and Beth flying from St. Louis to Chicago on Sundays to return Suzzanne to St. Louis. Claude paid for the airline tickets. Claude also paid Beth $600 a month in temporary child support. Those arrangements continued throughout most of the dissolution proceedings.

Beth's first husband and the father of

her two older children, Michael Koonce, lived in the St. Louis area and began to have frequent contact with Beth and the children when she moved back. He was often at her house and frequently stayed overnight during the pendency of the proceedings. According to Beth, he would sleep on the sofa in the living room. According to Michael, he would sleep in the basement.

Dr. James N. Watzke, a clinical psychologist, was the court appointed conciliator pursuant to the Du Page County mandatory conciliation program. Beth was dissatisfied with Dr. Watzke's services and petitioned for an independent custody evaluation. The trial court ordered Beth and Claude to submit to an independent custody evaluation by Dr. Michael C. Rabin, another clinical psychologist. While Dr. Watzke concluded that it was in Suzzanne's best interests for Claude to have custody, Dr. Rabin concluded that it was in Suzzanne's

best interests for Beth to have custody. Each psychologist prepared written reports which were admitted into evidence.

Ronald DaRosa was appointed as attorney for Suzzanne and appeared on her behalf through the completion of the custody portions of the trial. During closing arguments on the issue of custody, DaRosa argued that Beth would be the better custodial parent. In a four-page, single-spaced letter opinion dated April 15, 1991, the trial judge concluded that Beth would be the better custodial parent, and that the best interests of Suzzanne would be served by awarding sole custody to Beth.

From the beginning of the case and through the custody portions of the trial, Claude was represented by John R. Heying, who is also the attorney handling this appeal for Claude. The day before the property portion of the trial was to begin, Claude terminated the services of Heying,

alleging a difference of opinion regarding the presentation of property related evidence. The trial judge signed an order granting Heying leave of court to withdraw as Claude's attorney. Claude requested a delay of the trial to obtain new counsel. The trial judge denied Claude's request, stating in part that Heying appeared to be representing him "more adequately and with greater diligence than in many instances I felt the case deserved." The property portion of the trial began the next day and was conducted with Claude acting pro se.

Both Beth and Claude had non-marital property at the beginning of the marriage. By the time Beth filed for dissolution of marriage, she did not have any non-marital property left other than personal belongings and her DePaul Hospital pension. With the exception of a rental residential property, almost all of Claude's non-

marital property had been commingled and placed in joint tenancy with Beth during the marriage.

After hearing evidence and testimony, the trial judge valued the marital estate at $204,000 and awarded Beth $86,000 or 42% of the estate, her car and her personal belongings. In an opinion letter dated July 10, 1991, the trial judge initially noted that he "found it extremely difficult to arrive at [property] valuations in that the exhibits and the testimony as to the evaluations of assets are unclear at best and confusing at worst." He found that Claude's contributions of non-marital assets to certain marital assets were gifts to the marital estate. He also concluded that Claude had improperly used the $75,000 line of credit from Harris Bank "for unfruitful and unnecessary litigation costs, private investigatory services and the like and [that Claude] shall save and hold [Beth]

harmless on such indebtedness." An order was entered on August 27, 1991, that was based on the above opinion letter and provided the following distribution of the marital estate:

> "III. The following marital assets shall be transferred to [Beth]:
>
> The Horizon Savings Certificate of Deposit;
> The Dreyfus fund;
> [Beth's] IRA funds;
> [Beth's] automobile;
> The MG Midget automobile;
> $48,000 of cash from the sale of securities from the Dean Witter stock portfolio;
>
> IV. That [Claude] shall execute a Letter of Direction to Dreyfus directing the liquidation of the fund and payment of the cash value to |Beth];
>
> V. The [Claude] shall provide [Beth] with a signed title to the MG Midget automobile;
>
> VI. That [Claude] shall direct Dean Witter to transfer to [Beth] stocks and/or securities having a

value of $48,000 on July 10, 1991, which are immediately liquid without penalty and which have a gain or loss on the date of July 10, 1991 which when taken together represents approximately the average gain or loss on the total stock and securities in the portfolio [sic];

VII. That [Claude] shall execute any and all other documents necessary to transfer title to the assets named in paragraph III above to [Beth];

VIII. The balance of marital assets shall be the property of [Claude];

IX. That [Beth] shall execute a quit claim deed transferring title to the marital residence on Kenilworth in Naperville to [Claude];

X. That [Beth] shall execute any and all other documents necessary to transfer title to the remaining assets to [Claude];

XI. That [Claude] shall be solely responsible for all marital indebtedness including, but not limited to, the Harris Executive Line of Credit, all joint credit card debt, and the note and mortgage for the marital resi-

> dence, and shall hold [Beth] harmless and indemnified on the indebtedness."

After a subsequent hearing on attorney fees, the trial judge denied Beth's petition for $42,000 in attorney fees. Claude then filed a timely notice of appeal, pro se, apparently rehiring attorney Heying at a later time for purposes of this appeal.

CUSTODY

As best as we can ascertain, Claude argues that the trial court's decision that it would be in Suzzanne's best interests for Beth to have sole custody is against the manifest weight of the evidence. Claude urges this court to reverse the lower court's custody decision and grant him custody of Suzzanne. Claude also argues that the trial court's failure to make specific findings on the issue of custody violated his right to due process and fundamental fairness. Beth responds that this court should affirm the lower court's

custody determination because it is supported by evidence and testimony in the record, and because the trial court was in a better position to evaluate the credibility of the witnesses and the needs of the children.

"One of the most difficult tasks of trial courts is determining which parent in a failed marriage will have custody of the children." (In re Marriage of Wright (1991), 212 Ill. App. 3d 392, 395.) The paramount consideration in making such a determination is the best interests of the child. Wright, 212 Ill. App. 3d at 395; In re Marriage of Williams (1990), 205 Ill. App. 3d 613, 619.

Section 602 of the Marriage and Dissolution of Marriage Act (Act) (Ill. Rev. Stat. 1989, ch. 40, par. 602) governs custody proceedings and sets forth certain considerations for a court when it determines the best interests of the child:

"(a) The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

(1) the wishes of the child's parent or parents as to his custody;

(2) the wishes of the child as to his custodian;

(3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest;

(4) the child's adjustment to his home, school and community;

(5) the mental and physical health of all individuals involved;

(6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person; and

(7) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child.

(b) The court shall not consider conduct of a present or proposed custodian that does not affect his relationship to the child.

(c) The court shall presume that the maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional well-being of their child is in the best interest of the child. However, such presumption shall not

be construed as a presumption that an order awarding joint custody is in the best interests of the child." Ill. Rev. Stat. 1989, ch. 40, par. 602.

The trial court is not required to make specific findings for each factor as long as the record reflects that evidence of the factors was considered by the trial court before making its decisions. (In re Marriage of Lombaer (1990), 200 Ill. App. 3d 712, 723; In re Marriage of Slavenas (1985), 139 Ill. App. 3d 581, 585.) The trial court's determination of custody will not be disturbed upon review unless it is against the manifest weight of the evidence, manifestly unjust (In re Marriage of Balzell (1991), 207 Ill. App. 3d 310, 313; Williams, 205 Ill. App. 3d at 618) or there has been a clear abuse of discretion (In re Marriage of Seymour (1990), 206 Ill. App. 3d 506, 512). The reviewing court may consider the entire

record before it. In re Marriage of Edsey (1990), 199 Ill. App. 3d 39, 56.

We initially note that there is a strong and compelling presumption that the trial court, the entity closest to the litigation, has made the proper custody decision. (Wright, 212 Ill. App. 3d at 395; Balzell (1991), 207 Ill. App. 3d at 314.) And generally, a reviewing court will not disturb the trial court's determination of credibility because the trial court has a superior vantage point, which cannot be reproduced from the cold record, to observe and judge the witnesses' demeanor and credibility. (Szesny v. Szesny (1990), 197 Ill. App. 3d 966, 973; see Williams, 205 Ill. App. 3d at 619.) The trial court is therefore in a better position to evaluate the credibility of witnesses, as well as the temperaments, personalities, and capabilities of both parents. See Balzell, 207 Ill. App. 3d at 314.

Our independent review of the evidence and testimony leads us to conclude that the trial court's custody decision is not against the manifest weight of the evidence. The trial judge heard testimony from both parents, two court-appointed psychologist, whose reports were also introduced into evidence, Beth's former husband, Beth's two children by her previous marriage, Claude's private investigator, and Claude's two children by his previous marriage. In a detailed opinion letter, the trial judge explained why he believed that it would be in Suzzanne's best interest for Beth to have sole custody. He reviewed the desires of each parent to have maximum involvement with Suzzanne's upbringing, Suzzanne's present living situation with Beth's family and extended family, the proven parental capabilities of both Claude and Beth, and Suzzanne's adjustment to her home, school and community in Missouri. The judge found

that given the animosity between the parents, joint custody would be "unworkable and destructive to" Suzzanne. He noted the relationship between Beth and Michael Koonce, and expressly stated that he could not condone it. The judge reviewed the recommendations of both psychologists, concluding that Dr. Rabin's "report, testimony and conclusions [were] free from any bias or prejudice and more clinically sound." He found that Dr. Watzke "clearly showed by his report and testimony a bias and prejudice towards [Beth]." We conclude that the trial court's custody decision is supported by the evidence, and not against the manifest weight of the evidence.

As to Claude's next argument that the trial court's failure to make specific findings on this issue violated his right to due process and fundamental fairness, we initially agree with Beth that he waived the argument by presenting it for the first time

on appeal. (Western Casualty & Surety Co. v. Brocher (1985), 105 Ill. 2d 486, 500.) Even if we were to consider his argument, we find that the trial judge's opinion letter dated April 15, 1991, contains very specific findings, even though he was not required to make specific findings for each factor listed in section 602(a) of the Act (Ill. Rev. Stat. 1989, ch. 40, par. 602(a)). (See In re Marriage of Diehl (1992), 221 Ill. App. 3d 410, 424.) We find no reason to disturb the trial court's decision to grant sole custody of Suzzanne to Beth.

EVIDENTIARY ISSUES

Claude raises two evidentiary issues, and we assume that he would argue that each alleged error by the trial court constituted reversible error. He first argues that the trial court erred by allowing the testimony of Dr. Rabin into evidence. He contends that because Claude did not consent to Dr. Rabin testifying about conversations between them,

the trial court erred by allowing such testimony, citing the Mental Health and Developmental Disabilities Confidentiality Act (Act). Ill. Rev. Stat. 1989, ch. 91 1/2, par. 801 et seq.

Beth responds that Claude should be precluded from arguing that he was not aware of the purpose of Dr. Rabin's evaluation since such evaluation was directed by a court order dated September 6, 1989, which was entered in open court in the presence of Claude's attorney. Beth also argues that Dr. Rabin testified that Claude was informed by him of the nature of the evaluation.

We find Beth's arguments persuasive. Claude acquiesced to the appointment of Dr. Rabin by way of his attorney's involvement and knowledge of the appointment order. Dr. Rabin testified that he informed Claude of the purposes of the evaluation when they met. We conclude that Claude waived the patient-therapist privilege and any consent

required of him under the Act. See Bland v. Department of Children & Family Services (1986), 141 Ill. App. 3d 818, 826 (privilege under the Act can be waived directly or indirectly).

Claude next argues, with little specificity, that the trial court erred in allowing a tape recorded telephone conversation into evidence. The taped conversation is in the form of a cassette tape. Beth recorded a telephone call that she received from Claude one evening during the proceedings. At one point during the taped conversation, Claude states that Beth "could tape all she wanted." The animosity between Claude and Beth becomes very apparent on the tape. Claude begins by asking to talk with his daughter, Suzzanne. When Suzzanne, age two at the time, gets on the line, Claude asks her if "Mommy" is sleeping with "Daddy Michael," apparently referring to Beth's former husband Michael Koonce. Suzzanne

then expresses a few words of babytalk, after which Beth picked up the receiver. The remaining two to three minutes of the tape are filled with screaming insults by Claude.

Beth claims that under Illinois law, a tape recording of a conversation is not inadmissible if consented to by both parties, citing section 14-2(a) of the Illinois Eavesdropping Act (Ill. Rev. Stat. 1989, ch. 38, par. 14-2(a)). We agree. Section 14-2(a) states in pertinent part that a person commits eavesdropping when he "[u]ses an eavesdropping device to hear or record all or part of any conversation unless he does so (1) with the consent of all parties to such conversation." (Emphasis added.) We conclude that Claude consented to the taping, as evidenced by his words to that effect on the tape itself, and that the trial court did not error in allowing the tape into evidence.

CLAUDE'S RIGHT TO DUE PROCESS

Claude raises two issues under this argument heading: (1) that he was denied due process when the trial court refused to allow him time to hire a new attorney after he terminated the services of attorney Heying in the middle of trial; and (2) that the trial court made errors, reversible errors we assume, regarding discovery and evidence.

As to the first issue, our review is hindered at the outset because we cannot read Claude's complete argument since the top of page 57 of his brief is missing. Claude appears to argue that when he fired his attorney and announced such in court on June 5, 1991, the trial court denied him due process by not allowing him a few days to hire a new attorney. We disagree.

Claude did not have an absolute right to a continuance in the middle of the ongoing trial to obtain new counsel. Under either section 2-1007 of the Civil Practice Law

(Ill. Rev. Stat. 1989, ch. 110, par. 2-1007) or Supreme Court Rule 231(f) (134 Ill. 2d R. 231(f)), Claude had to show good cause or a sufficient excuse before the trial judge could, at his discretion, have granted a continuance. The following colloquy took place between the trial judge and Claude after Claude fired his attorney:

"MR. STRASS: Your Honor, I would like to have some time to get an attorney.

THE COURT: Sir, your request is denied. We are in the middle of a trial. We will be proceeding tomorrow morning at 9:30.

MR. STRASS: I do not have an attorney, Your Honor.

THE COURT: That is your choice.

MR. STRASS: It is not my choice.

THE COURT: It certainly is.

MR. STRASS: No, I am requesting some time--

THE COURT: You are an adult. You are a highly educated person, not only education-wise, but in the business world. And your choice is -- when the case is in the middle of the trial, I am not going to postpone it for you to obtain the services of another attorney. We are too far along in the matter.

Your attorney has represented you, in this Court's opinion, more adequately and with greater diligence than in many instances I felt the case deserved. And I find no basis upon which to continue the matter, nor do I find a basis upon which to discharge your attorney."

We agree with the trial judge that Claude has

not shown good cause or a sufficient excuse to justify a continuance. We find no error in the trial court's denial of Claude's request for "some time" to hire a new attorney.

As to the next issue, Claude raises ten presumably reversible errors by the trial court: (1) refusal to allow discovery relating to an alleged forged signature; (2) refusal to allow discovery of premarital property; (3) refusal to allow evidence of premarital property; (4) refusal to allow an offer of proof on premarital property; (5) refusal to allow certain statements for impeachment purposes; (6) refusal to admit an exhibit; (7) allowing Beth to provide testimony on property values; (8) refusal to allow certain evidence on expenses; (9) the trial judge's making of pejorative comments on the evidence; and (10) refusal to allow evidence to support Claude's motion for reconsideration.

As to the first issue regarding the trial court's refusal to allow discovery on an alleged forged signature, we find only one sentence in Claude's brief where he argues the point, followed by a string citation to three Supreme Court Rules, a section of the Illinois Code of Civil Procedure, two Illinois appellate cases and two Illinois Supreme Court cases. There is no discussion of which allegedly forged signature Claude is concerned with or how the numerous authorities support his rather limited argument. This court has previously cautioned that "the appellate court is not a depository in which the appellant may dump the burden of argument and research." (Dillard v. Kean (1989), 183 Ill. App. 3d 28, 31.) A bare contention followed by a long string citation does not constitute appellate argument. We therefore conclude that Claude has waived our consideration of the forgery issue.

The next three issues raised by Claude can be summarized as a contention that the trial court erred by refusing Claude's attempts to introduce evidence concerning financial events which took place prior to the parties' marriage. We agree with Beth that Claude confuses the purpose of testimony and evidence on the issue of non-marital property. It is proper for the trial court to consider the existing non-marital property of a party when making a maintenance award (see, e.g., Bentley v. Bentley (1981), 84 Ill. 2d 97, 101), when making a marital property award (see, e.g., In re Marriage of Landfield (1991), 209 Ill. App. 3d 678, 689), or when considering commingling or reimbursement issues (see, e.g., In re Marriage of Eddy (1991), 210 Ill. App. 3d 450, 458). However, in this case there was no evidence that Beth still had any of the property that she brought into the marriage other than her pension and personal belong-

ings. Beth was not demanding at trial that she be reimbursed for her non-marital contribution to the marital estate. Therefore, the trial court properly ruled that all attempts to inquire into family loans or the financial disposition of property from her previous marriage, all of which took place prior to her marriage to Claude, were irrelevant. We find no error in that regard.

Claude's next contention is that the trial judge committed reversible error in sustaining four objections made by either Beth's attorney or Suzzanne's attorney to questions posed to witnesses by Claude, while he was acting pro se, or by Claude's attorney. Three objections were apparently sustained on hearsay grounds, and one sustained on relevancy grounds. Our review is hindered because Claude has limited his discussion of all four situations to one paragraph in his brief, which contains various string citations to federal and

Illinois caselaw but no explanation of how the cases support his argument. We are further hindered here since no offer of proof was submitted by Claude or his attorney after the trial judge sustained each objection. (See Simon v. Plotkin (1977), 50 Ill. App. 3d 603, 607 ("[a]n offer of proof is necessary to preserve a question for review where, as here, the trial court refuse[d] to allow the testimony of a witness as to a certain matter").) On that latter ground alone, we dispense with consideration of the three hearsay objections.

As to the fourth objection, the trial judge found that a question posed by Claude, acting pro se, to Beth's attorney during the hearing on Beth's petition for attorney fees was irrelevant. Claude asked Beth's attorney about Beth's purchase of a home. The trial judge found that the question did not have to do with attorney fees, directed

Beth's attorney not to answer, and instructed Claude to ask his next question. We agree with the trial judge that the question was not relevant to the attorney fees in question and therefore find no error. Furthermore, since Beth's petition for fees was eventually denied, any error alleged by Claude to have occurred during the fees hearing would constitute harmless error.

Claude next argues that the trial court erred by not allowing an exhibit listing his good qualities and his wife's bad qualities, while it did allow Beth to submit such an exhibit. Claude argues that his exhibit should have been allowed into evidence as a "past recollection recorded." However, Claude's attorney failed to make an offer of proof as to the exhibit when the trial judge refused to admit it. Having failed to properly preserve the question for review, Claude has waived our consideration of the issue. Simon, 50 Ill. App. 3d at 607.

Claude's next contention is that the trial court erred by allowing Beth to testify as to the value of the marital residence because she was not an expert. The general rule in Illinois is that a property owner is competent to render an opinion as to the value of his or her property. (Hill v. Ben Franklin Savings & Loan Association (1988), 177 Ill. App. 3d 51, 56; American National Bank & Trust Co. v. City of North Chicago (1987), 155 Ill. App. 3d 970, 972.) We therefore find no error in allowing Beth to testify as to the value of the marital residence.

Claude lumps his last three alleged errors into a final paragraph. He contends that the trial court erred by refusing to allow evidence on expenses relating to the alleged forgery. We disagree. The trial court simply denied Claude's third attempt to raise the forgery issue during trial. Claude next contends in two sentences that

the trial judge erred by making "pejorative judicial comments on the evidence and [issuing] a ruling based on feelings, presumption, and potential criminal acts, without evidence." We disagree. We find none of the referenced comments by the trial judge to be pejorative in nature, and do not know which ruling Claude is alleging error with. Claude finally contends the trial court erred in not allowing him to introduce evidence on his motion for reconsideration. We disagree. A motion for reconsideration under section 2-1203 of Civil Practice Law (Ill. Rev. Stat. 1989, ch. 110, par. 2-1203) is addressed to the trial court's sound discretion. (In re Marriage of Hopkins (1982), 106 Ill. App. 3d 135, 137.) We do not believe that the trial court erred in not re-opening proofs after nine interrupted months of trial. We find no error in that regard.

PROPERTY DIVISION

Claude argues that the trial court's

property division warrants reversal for six reasons: (1) that he contributed more property to the marriage and equity requires this contribution to be recognized; (2) that Beth made a "negative" contribution to the marriage by refusing to work; (3) that the value and amount of nonmarital property was not adequately determined, and that transmutation was not intended; (4) that the "actual" marriage was of short duration; (5) that the property division is violative of the constitutional guarantee of equal protection since it was based on sex; and (6) that the award is excessive, inequitable and improper.

Beth responds that this court should affirm the trial court's distribution of property as a proper exercise of discretion. She contends that Claude has waived the constitutional arguments he puts forth in his brief since he raises them for the first time on appeal. She also claims that

Illinois does not recognize the theory of "negative" contribution to the marital estate.

We initially recognize that in a dissolution of marriage proceeding, the trial court is vested with a great deal of discretion regarding property matters. This court will reverse a property distribution order if we find that the trial court abused its discretion; that is, where no reasonable person would have adopted the court's decision. (In re Marriage of Olson (1992), 223 Ill. App. 3d 636, 648.) We recognize that the objective of the trial court is to make a property division that is in just, rather than equal, proportions. (Olson, 223 Ill. App. 3d at 648; see Ill. Rev. Stat. 1989, ch. 40, par. 503(d).) Section 503(d) of the Marriage and Dissolution of Marriage Act (Act) provides that the trial court shall assign to each spouse his or her non-marital property, and then divide the marital

property, taking into account several enumerated factors. (Ill. Rev. Stat. 1989, ch. 40, par. 503(d).) We will examine the trial court's distribution of 58% of the $204,000 marital estate to Claude and 42% to Beth, and Claude's allegations of error, in light of the above authorities.

Claude's first argument, that his contributions to the marital estate were qreater than Beth's and not properly recognized by the trial court, misses the mark. We will first disregard the first two sentences of Claude's argument on this point. One appears to be an unsubstantiated statement of law. The other is an allegation of fact, stated in conclusory terms and without reference to the record. Both are therefore of little help in our analysis. We are left to consider the three remaining sentences in Claude's argument, one of which contains a string citation to three dissolution of marriage cases, all of which

addressed the general area of property division. In essence, Claude argues that "the record indicates that [he] contributed substantially more financially to the marriage than [Beth]," and the trial court committed reversible error by ignoring his contribution. We conclude that Claude has waived the issue by not fully developing the factual basis in the record that allegedly supports his argument. (Dillard v. Kean (1989), 183 Ill. App. 3d 28, 31.) Without precise reference to what his allegedly "excess contribution" consisted of, other than a mere reference to his oral argument on his motion for reconsideration, Claude has failed to provide this court with an argument worthy of our consideration.

Claude's next argument is that the trial judge erred by not recognizing that Beth made a "negative" contribution to the marital estate by bringing debt to the marriage and by refusing to work, citing as

authority In re Marriage of Turner (1983), 206 Mont. 292, 670 P.2d 568. We agree with Beth that Illinois does not recognize a "negative" contribution theory. Our research failed to find one Illinois case discussing the theory. While we note that section 501(d)(1) of the Act recognizes that the "contribution or dissipation" of property by either spouse is a relevant factor to be considered when the trial court divides the marital property (Ill. Rev. Stat. 1989, ch. 40, par. 501(d)(1)), Claude does not explain or argue why this court should expand the reach of section 501(d)(1) to include "negative contribution." We see no reason to do so. We interpret the Turner case to merely state that the Supreme Court of Montana decided to affirm a trial court's determination in a marriage dissolution case that one spouse, "a parasitic freeloader," made no contribution to the marriage and should be awarded only his

personal belongings. (Turner, 206 Mont. at 294-96, 670 P.2d at 570-71.) The Turner decision makes absolutely no mention of "negative" contribution. Claude has not persuaded this court that the trial court erred in this regard.

Claude next argues that the value and amount of non-marital property was not adequately determined, and that any transmutation of his non-marital property into marital property was not intended. In support of this point, Claude provides scant argument, no citation to the record, a general citation to section 503 of the Act, and a string citation to seven Illinois cases. Since we do not know what allegedly non-marital property Claude is referring to or how the numerous authorities support his contention, we conclude that Claude has waived our consideration of this issue. Dillard, 183 Ill. App. 3d at 31.

Claude next posits that the trial court failed to consider the short duration of the "actual" marriage, citing as authority Marcotte v. Marcotte (Colo. App. 1974), 525 P.2d 507. Although Claude did not provide a discussion of the facts or holding of Marcotte, or argue why the instant case is analogous to the Colorado decision decided 18 years ago, we proceed nonetheless. The Marcotte court determined that the trial court did not abuse its discretion in finding that the wife was entitled to less than half of the marital estate, based in part on the fact that the marriage had lasted only three years. (Marcotte, 525 P.2d at 509.) We fail to see how Marcotte provides support for Claude's argument since Beth received 42%, less than half, of the marital estate. We also note that the Marcotte court decided not to select the opinion for official publication, which leaves its degree of precedential value in doubt. We

therefore find no error in this regard.

Claude next argues that the property division is violative of the constitutional guarantee of equal protection since it is based on sex. While Claude has provided two pages of general verbiage relating to equal protection and the division of marital property, he fails to show how the issue he raises, or the caselaw he invokes, relates to the 58%/42% division of marital property in the instant case. Without such a showing, we conclude that Claude has waived our consideration of the issue. Dillard, 183 Ill. App. 3d at 31.

Claude's final argument regarding the marital property division is that the amount awarded to Beth was excessive, inequitable and improper. However, Claude appears to argue that the division of marital property in Illinois dissolution of marriage cases should be 50%/50%, which would have increased Beth's share in this case from

$86,000 to $102,000. We fail to understand the logic or reasoning of Claude's argument, given its effect if implemented in this particular case. Since Claude has not provided any citation to the record within this argument or explained how the various cases he cited as authority support his proposition, we consider this issue to be waived. Dillard, 183 Ill. App. 3d at 31.

Having reviewed all of Claude's allegations of error regarding the division of marital property, we find no reason to disturb the award.

CHILD'S ATTORNEY FEES

Claude's final argument is that the trial court erred in awarding Suzzanne's attorney, Mr. DaRosa, $10,737.50 in fees, to be split equally by Claude and Beth, since the hourly charges billed were 40-50% higher than the other attorneys involved, and did not conform to usual and customary standards in the community. Beth notes that while it

is not necessarily in her best interest to respond to this argument, DaRosa charged $150 per hour for office time and $175 per hour for court time, and the trial court found those rates to be reasonable based on DaRosa's degree of experience and expertise.

An award of attorney fees is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. (In re Marriage of Siddens (1992), 225 Ill. App. 3d 496, 502.) The factors to be considered in determining what are reasonable fees include the attorney's skill and standing, the nature of the controversy, the novelty and difficulty of the questions at issue, the time and labor required, the usual and customary charge in the community and the benefits to the client. (Siddens, 225 Ill. App. 3d at 502.) Finally, in applying these factors the trial court quite properly may rely on its own

knowledge and experience in determining the value of the legal services rendered. Siddens, 225 Ill. App. 3d at 503.

At the conclusion of the hearing on attorney DaRosa's fees, the trial judge concluded:

> "Let the record reflect that first of all[,] as it relates to the hourly rate charged by Mr. DaRosa for his time, the Court finds that as a matter of knowledge to the court which the court must be aware of as to the usual and customary charges charged by attorneys who are exclusively within the practice of matrimonial law in DuPage County and who have had the experience that Mr. DaRosa has had in the field of matrimonial law in DuPage County, that his hourly rate of $150 per hour for office time and $175 for court time is below the usual and custom-

ary charges for an attorney with that experience here in DuPage County.

Secondly, as to the number of hours expended by Mr. DaRosa, there is no evidence shown to the court that they were not necessary for his representation of his client, that being the minor child in this case. And therefore, the number of hours expended is found to be reasonable also."

We conclude that Claude has failed to show this court why the trial court's award of attorney fees to DaRosa was an abuse of discretion. While he argues that DaRosa's rates are 40-50% higher than the other attorneys involved, he provides no reference to the record to support this allegation, other than a reference to a question of his at the attorney fees hearing where he repeats the 40-50% figure. Further, we

agree with Beth that Claude was allowed an adequate opportunity to question DaRosa and was not denied the opportunity to introduce evidence that DaRosa's rates were unreasonably high. We also note that, while Claude argues that he reaped little benefit from the services of DaRosa, we emphasize that DaRosa's client was Suzzanne, not Claude. We find no reason to disturb the trial court's award of attorney fees to Suzzanne's attorney.

For the above reasons, the judgment of the circuit court of Du Page County is affirmed.

Affirmed.

INGLIS, P.J., with DUNN and BOWMAN, JJ., concurring.

UNITED STATES OF AMERICA

STATE OF ILLINOIS COUNTY OF DUPAGE

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT

IN RE THE MARRIAGE OF

Beth G. Strass

Plaintiff - Petitioner

and

Claude A. Strass

Defendant - Respondent

No. 89D408

ORDER

This matter having come before the Court on Defendant's Motion to Reconsider Custody, Emergency Petition to Enforce Visitation, Petition to Enforce Daily Telephone Contact, and Plaintiff's Motion to Clarify Judgment & Enter Judgment, the Court having heard the argument of counsel for Plaintiff and the Defendant

It Is Hereby Ordered:

1. That the Petition to Enforce Visitation & Compensate for cost of travel for a visitation which did not occur is denied.

2. That the Petition to Enforce Daily Telephone Contact is denied.

3. That the Motion to Reconsider the Custody decision is denied.

4. That the Second Supplemental Judgment for Dissolution of Marriage shall enter.

Enter: Robert A. Cox
JUDGE

Date: 8/27/91

Name M. Cellucci

DuPage Attorney No. 13650

Attorney for Plaintiff

Address 1155 S. Washington

City Naperville, IL 60540

Phone 961-0225

JOHN W. COCKRELL, CLERK OF THE 18TH
JUDICIAL CIRCUIT COURT
WHEATON, ILLINOIS 60189-0707

1zz

STATE OF ILINOIS)
) SS
COUNTY OF DU PAGE)

IN THE CIRCUIT COURT FOR THE

18TH JUDICIAL CIRCUIT

DU PAGE COUNTY, WHEATON, ILLINOIS

In Re the Marriage of:	
Beth G. Strass,	
Plaintiff-Counter	
Defendant,	
and	Case No. 89 D 408
Claude A. Strass,	
Defendant-Counter	
Plaintiff.	

Order

This matter having come before the Court on Defendant's Motion for Reconsideration of Property Ruling, the Plaintiff's Petition for Attorney's Fees, the Defendant present in person pro se, the Plaintiff

present by counsel, the Court having heard the argument of Defendant and response of Plaintiff's counsel on the Motion for Reconsideration;

It Is Hereby Ordered:

1. That the Motion for Reconsideration is denied;

2. That the Defendant has 14 days to prepare and file a Response to the Plaintiff's Petition for Attorney's Fees;

3. That the hearing on the issue of Plaintiff's fees is set for September 24, 1991 at 10:30 a.m. in Courtroom 3009.

Date: 9/24/91

Robert A. Cox
Judge

Prepared by:

#13650

Cellucci, Yacobellis & Holman

lbbb

Marsha H. Cellucci

Attorney for Plaintiff

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UNITED STATES OF AMERICA

STATE OF ILLINOIS COUNTY OF DUPAGE

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT

IN RE THE MARRIAGE OF

Beth G. Strass

Plaintiff - Petitioner

and

Claude A. Strass

Defendant - Respondent

No. 89D408

ORDER

The cause having been brought before the Court on the Fee Petition of R.A. DaRosa, attorney for the minor child, and the court having conducted a hearing thereon and being fully advised in the premises and the Petitioner having Stipulated to the Reasonableness of the Hourly Rates and number of hours expended, It Is Therefore found and ordered:

1. That the court finds that the

1ddd

Hourly Rates charged (150/175) are reasonable.

2. That the court finds that the number of Hours Expended are also reasonable and necessary.

3. That R. A. DaRosa's Fee Petition in the amount of $10,737.50 is granted as prayed and each party will pay one-half thereof, less credit for amounts paid (i.e. Petitioner has heretofore paid $750 and Respondent has heretofore paid $2,198.75)

Enter: Robert A. Cox
JUDGE

Date: 9/18/91

Name _____

DuPage Attorney No. R. A. DaRosa & Miller

Attorney for Child

Address 208 N. West

City Wheaton, Il

Phone 690-6200

JOHN W. COCKRELL, CLERK OF THE 18TH
JUDICIAL CIRCUIT COURT
WHEATON, ILLINOIS 60189-0707

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FILED
MAR 1 1993
OFFICE OF THE CLERK

No. 92-1188

In The

Supreme Court of the United States

October Term, 1992

IN RE THE MARRIAGE OF

CLAUDE A. STRASS,

Petitioner,

and

BETH G. STRASS,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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No. 92-1188

In The

Supreme Court of the United States

October Term, 1992

IN RE THE MARRIAGE OF

CLAUDE A. STRASS,

Petitioner,

and

BETH G. STRASS,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Supreme Court of Illinois denied Claude Strass' petition for leave to appeal on October 7, 1992. That denial is not reported in an official published reporter.

The opinion of the Appellate Court of Illinois, which was the subject of the petition for leave to appeal to the Supreme Court of Illinois, was filed on May 22, 1992. That opinion of the Appellate Court of Illinois is not reported in an official published reporter, but bears a docket number of No. 2-91-1094 (Ill. App. Ct., 2nd Dist., May 22, 1992).

The denial of the petition for leave to appeal by the Supreme Court of Illinois and the opinion of the Appellate Court of Illinois are reprinted in the appendix to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The denial of the petition for leave to appeal by the Supreme Court of Illinois was entered on October 7, 1992. No petition for rehearing was filed. The opinion and judgment of the Appellate Court of Illinois was entered on May 22, 1992. No petition for rehearing was filed. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States of America, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a

> witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Constitution of the United States of America, Amendment XIV, Section 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Illinois Supreme Court Rules, Rule 231(f), Ill. Rev. Stat. Ch. 110A § 231(f) (1991):

> (f) Time for Motion. No motion for the continuance of a cause made after the cause has been reached for trial shall be heard, unless a sufficient excuse is shown for the delay.

Illinois Marriage and Dissolution of Marriage Act, ¶ 602(c), Ill. Rev. Stat. Ch. 40, § 602(c) (1989):

> (c) The court shall presume that the maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional well-being of their child

> is in the best interest of the child. However, such presumption shall not be construed as a presumption that an order awarding joint custody is in the best interest of the child.

STATEMENT OF THE CASE

This case is an Illinois case brought by Beth Strass to dissolve her marriage to Claude Strass. The trial of the case began in January 1991 (C295-C299), and continued on intermittent dates thereafter with Judgments entered dissolving the marriage and awarding custody of the minor child on June 6, 1991 (C323-C326), a Judgment entered distributing the property on August 27, 1991, and an order establishing visitation and denying Claude Strass' Motion for Reconsideration on September 18, 1991 (C382).

Grounds were stipulated and the custody portion of the case was tried first to minimize the time spent at trial by the attorney appointed to represent the child. The custody portion of the trial concluded on April 8, 1991 and the continuation of the trial on the remaining issues was then scheduled for April 18, 1991. On April 16, 1991, the judge gave his written decision on the issue of custody in which he found the husband to be "capable of being the custodial parent" (C239-242, C240). On April 18, 1991, an order was entered pursuant to motion by Claude Strass granting his request for a continuance because of an oral surgery and the trial was rescheduled to resume May 10, 1991 (C245). On May 10, 1991, an order was entered pursuant to motion by Claude Strass granting his request for a continuance because of the death of an extended family member and the trial was rescheduled to resume May 30, 1991 (C255). On May 30, 1991, an order was entered pursuant to motion by Claude Strass granting his request for a continuance because of his being called out of state on business (C256). The trial was rescheduled to resume June 5 and 6, 1991. Before the trial was resumed, Claude Strass filed a motion requesting DNA testing of the parties and their minor child

alleging that he now questioned his paternity of the child. On June 5, 1991, after hearing argument on Claude Strass' motion questioning paternity, the court denied the motion. On the same morning of June 5, 1991, Claude Strass requested a continuance of the trial due to the fact that he had fired his attorney and the court denied his request for a continuance of the trial beyond the next morning. Through June 5, 1991, Claude Strass was represented by one attorney, John R. Heying. On June 6, 1991, Claude Strass proceeded to trial on the remaining issue *pro se* objecting to the denial of his request for time to obtain a new attorney. On June 7, 1991, the trial on the remaining issues was concluded and the trial judge, in ruling on a temporary summer visitation schedule, noted that "matters which have come to the Court's attention within the last month gives [sic] the Court some pause as to — I guess for want of a better term — the sincerity [of Claude] in wanting to maintain a relationship" with the child (C1938).

Claude Strass, once again represented by John R. Heying, the same attorney Claude fired in the middle of trial, appealed to the Illinois Appellate Court and raised, among other issues, the constitutional issue that he was denied due process of law when the trial court refused to allow him time to hire a new attorney after he terminated the services of Attorney Heying in the middle of trial. The Illinois Appellate Court declined to find that Claude Strass' constitutional rights were violated. The same issue was raised in Claude Strass' Petition for Leave to Appeal to the Supreme Court of Illinois and that petition was also denied by the Illinois Supreme Court.

SUMMARY OF ARGUMENT

The Supreme Court of the United States has not recognized an absolute constitutional right of an individual to counsel in civil cases. While some federal courts have found it appropriate to extend to an individual limited guarantees to counsel in certain types of civil cases involving questions of "liberty" or indigent

litigants and in cases involving a denial or limitation of a litigant's initial right to obtain counsel, the dissolution of marriage case at hand does not involve those types of questions. Further, this Court should not determine to expand the constitutional right of counsel to civil cases based on the particular facts of the case at hand.

REASONS FOR DENYING THE WRIT

The Supreme Court of the United States has not recognized an absolute constitutional right to counsel in a civil case. *Kentucky West Virginia Gas Company v. Pennsylvania Public Utility Commission,* 837 F.2d 600, 618 (3rd Cir. 1988).

This Court has, however, accorded to indigent litigants in certain quasi-criminal cases a constitutional right to counsel. The guarantee of fundamental due process of the Fourteenth Amendment was extended to a civil juvenile deliquency proceeding in *In re Gault,* 387 U.S. 1, 18 L. Ed. 2d 527 (1967). A constitutional right to appointed counsel has also been recognized for parents in certain civil cases involving a liberty interest such as a dependency case, *Cleaver v. Wilcox,* 499 F.2d 940 (9th Cir. 1974) and a neglect case, *People v. Brown,* 49 Mich. App. 358, 212 N.W. 2d 55 (1973).

The Supreme Court of the United States recognized in *Boddie v. Connecticut,* 401 U.S. 371 (1971) that "due process prohibit[s] a state from denying access to its courts" to indigent individuals in matrimonial litigation who are not able to pay the filing fees. The New York Court of Appeals held that an indigent litigant cannot be denied access to the courts by an inability to pay the costs of service. *Deason v. Deason,* 32 N.Y. 2d 93 (1973). However, in *In re Smiley,* 45 App. Div. 2d 785, the New York State Court of Appeals distinguished the issue of a due process right of an indigent litigant's access to courts from the issue of a constitutional right to appointed counsel in matrimonial cases and held that there was no such right.

In addition to the cases involving a litigant who is indigent or involving a litigant who faces a possible loss of a personal liberty, there are cases involving the right of due process as it relates to a litigant's right to a continuance to obtain counsel at the outset of a civil case. In one such employment discrimination case, the employee litigant's second attorney was permitted to withdraw two days before the scheduled start of trial. In that case, the trial court's refusal to grant the employee a 60 day continuance of the start of trial to obtain new counsel was held to be so arbitrary as to violate due process. *Anderson v. Sheppard,* 856 F.2d 741, 749 (6th Cir. 1988). In the present case, the discharge of the attorney took place in the middle of trial, not before the trial started, and after admonishment and warning by the trial judge that there would be no delay in resuming the trial. Even in criminal cases, it has been held that "There is no absolute right to counsel of one's choosing and a mere denial of a continuance to substitute counsel does not deprive a defendant of any constitutional right." *United States ex rel. Guillen v. DeRobertis,* 580 F. Supp. 1551, 1554 (N.D. Ill. E.D. 1984).

There are no family law cases recognizing a due process right to counsel involving a litigant who is not indigent or a litigant who does not face a potential loss of a liberty interest. The general rule seems to be that there is no constitutional right to counsel in dissolution of marriage proceedings. *State ex rel. Ondracek v. Blohm,* 363 N.W. 2d 113, 115 (1985).

The case at hand is certainly distinguishable from the matrimonial cases in which the constitutional right to counsel has been considered. The litigants are not indigent. There was no potential loss of personal liberty at stake nor was Claude denied the opportunity initially to obtain counsel. In addition, there are several reasons why it would be bad to use the case at hand to try to expand a constitutional right to counsel to other types of matrimonial cases.

First, the trial court had already been very indulgent in granting Claude Strass' three consecutive previous requests for continuances on April 18, 1991, May 10, 1991 and May 30, 1991. Then, still in the middle of trial, Claude Strass fired his attorney in the middle of the trial. The Illinois Supreme Court Rule 231(f), Ill. Rev. Stat. Ch. 110A, § 231(f) (1991) provides that no motion for a continuance shall be made after the start of trial unless a sufficient excuse is shown for the delay. The particular circumstances of Claude's firing his attorney cannot be held to be sufficient excuse. Claude Strass was warned by the trial judge before his attorney was allowed to withdraw that he would be expected to resume trial with or without an attorney. Claude then chose to terminate his representation and then chose to proceed *pro se*. The fact that Claude Strass fired his attorney, John R. Heying, in the middle of the trial and then hired that same attorney to represent him in the appeal of the trial court's decision suggests that Claude Strass was not really dissatisfied with his attorney's representation but was merely attempting to gain some advantage by delaying the proceedings.

Claude Strass represents to this Court in his Petition for Writ of Certiorari that he was given "no time" to obtain new counsel when, in fact, Claude was given approximately 24 hours. As to a particular detriment, Claude Strass represents to this Court in his Petition that the denial of his request for a continuance prevented him from having appropriate assistance of counsel at a point in the proceedings where he should have argued for logic and consistency on the issue of the amount of his visitation. However, Claude Strass was represented by counsel for the entire custody portion of the proceedings in which most all of the facts relevant to visitation frequency and schedules were presented to the court. In fact, at the conclusion of the custody portion of the trial, the trial judge indicated that he wanted the parties to agree on the visitation schedule if possible and if it was not possible, he would be in a position to rule quickly (C1588-C1589). Claude Strass was also

represented by counsel after the conclusion of the custody portion of the trial through June 5, 1991, the date that he argued the motion in which he alleged that he doubted he was the biological father of the minor child.

There was no real inconsistency or lack of logic in the trial judge's rulings on visitation. The judge first determined in his letter opinion filed on April 16, 1991 that Claude Strass was "capable of being the custodial parent" but awarded sole custody to Beth Strass. On June 5, 1991, the trial judge read Claude's Motion for DNA testing and heard argument on that motion in which Claude alleged that he was not the biological father of the minor child. The only other testimony that the trial judge heard which was relevant to visitation issues after April 16th was Claude's eliciting Beth's testimony on three alleged past visitation abuses (C1754-C1757 and C1790-C1798) and Beth Strass' testimony listing the child's school holidays (C1633-C1636). The judge then stated on June 7, 1991 that he came to believe that Claude Strass lacked sincerity in his desire to have a relationship with the child due to matters that he had heard in the last month (C1938). He could not have been referring to the testimony that he heard in the custody portion of the trial as that was concluded by April 16, 1991, well more than a month before June 7, 1991. He could only have been referring to the motion of Claude Strass alleging that he was not the biological father of the minor child (C262). The conclusion of the judge that Claude may not have been sincere in his desire to have a relationship with the child could very logically have impacted on his determination to order a "minimum" amount of visitation to Claude. Further, in view of the long distance visitation necessitated by the parties residing in the St. Louis, Missouri and Chicago, Illinois areas respectively, the ordered visitation of once a month and an annual extended period was not particularly "minimum".

Even though matrimonial cases involve all aspects of a person's personal and financial existence, a court, when

determining whether a matrimonial litigant has good or sufficient cause to be allowed a continuance in the middle of trial, must weigh the rights of all of the parties. Civil cases are unlike criminal cases where the "State" is versus an individual litigant. In the case at hand, we have two litigants whose rights had to be protected. Beth Strass had the right to expect the orderly and expeditious progress of her case to conclusion and her rights should not be inferior to Claude's right to fire his attorney and suffer the consequences.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny Petitioner's Petition for Writ of Certiorari to the Appellate Court of Illinois.

Respectfully submitted,

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